Notes on Acts and Laws

Contents

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CHAPTER 1
The Common Law

1. In the English system. Equity has acquired a technical connotation and we are accustomed to think of it as a whole jurisdiction distinct from Common Law principles.

2. For better or for worse, the stream of English Law divided into two channels, not without considerable disturbance of the soil and morbidity of the waters.

3. But the interdependence of Law and Equity has never wholly disappeared.

4. We ought not to think of Common Law and Equity as rival systems. Equity was not a self-contained system, at every point it presupposed the existence of Common Law.

The principle on which the Court of Equity granted relief

1. If we look for one general principle which more than any other influenced the Equity developed by the Chancery, we find it in a philosophical and theological conception of *conscience.*

2. The English Equity begins to be systematised under the guidance of a governing moral principle of conscience.

3. Not that we can suppose that all the Chancellors were assiduous and

consistent in the pursuit of that principle. Under the Tudors, some of them behaved with complete arbitrariness. These occasional aberrations may have inspired Seldon's oft quoted, but probably only half serious quip about the length of the Chancellor's foot. But they were not typical, the 'conscience' which the Chancellor set before him was normally something more constant and imperishable than the mere caprice of his own whim. A 'hardening' process sets in. By 1676 we find Lord Nottingham expressly repudiating the notion that the conscience of the Chancellor is merely *naturalis etinterna,* and in 1818, Lord Seldon summarily repudiates any notion of mere individual discretion being open to an Equity Judge. Equity is a settled system of conscience.

The limits of the Chancellor's authority

1. This prerogative to grant relief had certain limits':—

(i) It could be exercised only where law gave no rights but where conscience required that certain rights should be given—This was known as the *Exclusive* jurisdiction of Equity.

(ii) It could be exercised only where law gave rights required by conscience but the remedies which it gave were insufficient to satisfy justice—This was known as the *concurrent* jurisdiction of Equity.

(iii) It could be exercised in matters in which the law gave rights required by conscience and remedies sufficient to satisfy the ends of justice but as to which its process was too defective to secure the remedies without the assistance of Equity—This was known as the *auxiliary* jurisdiction of Equity.

The nature of an equitable right

1. The nature of an equitable right will be better understood if it was studied in contrast with a moral right and a legal right. A mere definition would be very little use.

2. By way of introduction we may begin by seeking to have a precise conception of a right. What do we mean when we say that any given individual has a right :

(i) If a man by his own force or persuasion can carry out his wishes, either by his own accord or by influencing the acts of others, he has the 'might' so to carry out his wishes.

(ii) If, irrespectively of having or not having this night, public opinion would view with approval or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing then he has a ' *moral right ' so* to carry out his wishes.

(iii) If, irrespectively of the approval or disapproval, acquiescence or non-acquiescence of public opinion, the State would support him in carrying out his wishes then he has a *legal right* so to carry out his wishes.

3. Whether it is a question of might, depends upon a man's own powers of force or persuasion. Whether it is a question of moral right depends on the readiness of public opinion to express itself on his side. Whether it is a question of legal right, depends upon the readiness of the State to exert its force on his behalf. A *legal right* exists where one course of action is enforced, and the other prohibited by that organised society which is called the State. A legal right is, therefore, an interest which is recognised and protected by the State. Right is any interest, respect for which is a duty and the disregard for which is a wrong.

The Characteristics of a legal right

1. A legal right is a right which unlike moral right is enforced by the State.

2. A legal right is founded in a title which must be shown to have been acquired in any one of the modes of acquiring title recognised by law—e.g. possession, prescription, agreement and inheritance, etc.

3. A vestitive fact which creates a title to a right in one person destroys the title of another to the same right.

4. A legal right creates an obligation which is either an obligation *in rem* or an obligation *in personam.*

In what respects does an equitable right resemble, in what respects does it differ, from a legal right

1. Equitable right is not like a moral right which is not enforced by the State. Equitable right is like a legal right in that it is enforced by the State.

2. A title to an Equitable right need not be created by any one of the recognised modes by which a title to a legal right is created. This is the most important distinction.

Illustration:

(i) A legal mortgage of land must be created by a deed. But an equitable mortgage may be created otherwise than by deed:—

(a) The statute of trade required that no action shall be brought upon any contract or sale of lands or any interest therein unless agreement was in writing and signed by the party or his agent.

But if the title-deeds of an estate are, without even verbal communication, deposited by a debtor in the hands of the creditor, the mere fact of such deposit is enough to constitute the creditor a mortgage of the estate.

(b) An agreement that a creditor shall hold land at a fair rent to be retained in satisfaction of the debt, is a mortgage in equity but not in law.

(ii) **Assignment**—Legal and Equitable.

Legal: (1) Assignment must be in writing under the hand of the assignor—signature of the agent not sufficient. -

(2) The writing must contain a direction or order to the debtor by the creditor to pay the assignee.

(3) There must be express notice of assignment to the debtor.

Equitable : (1) The mode or form of assignment is immaterial provided the intention of the parties is clear. Assignment may be verbal.

(iii) **Charge**—Legal and Equitable.

(iv) **Lease**—Equitable and Legal.

(v) **Servitude**—Equitable and Legal.

Married Women's Property

This illustrates how an equitable right can arise without the legal formalities of conveyance required for the creation of a legal right.

(1) At Common Law, husband and wife were one person, and the status of the wife merged in that of the husband. The result of this merger was that the husband became the absolute owner of her personal property and acquired the sole right of controlling and managing her real estate.

On her death he became absolutely entitled to any of her personal property that had not already been sold and to a life estate by *courtesy* in her fee provided a child had been born.

(2) Secondly, a husband could not make a grant to his wife directly or enter into a covenant with her, for to allow either of these things would have been to suppose her separate existence.

(3) The effect of marriage at Common Law was to make a man complete master of his wife's property and to deprive her of contractual capacity.

(4) If property was given to a married woman by words which indicated either expressly or by implication that she was to enjoy it *"for her sole and separate use".* Equity removed that property from the control of the husband by regarding him as a trustee, and conferred upon the wife full powers of enjoyment and disposition.

But equity went even further than this. Perceiving the danger that a husband might persuade his wife to sell her separate property and hand the proceeds to him, it permitted the insertion in marriage settlements of what is known as *"restraint upon anticipattion"*. The effect of such restraint, which is still usual, was that a woman while possessing full enjoyment of the income was prevented during her coverture from alienating or charging the corpus of the property. She could devise but could not sell or mortgage it. This was in complete contravention of the Common Law. At Common Law, not only marriage became a vestitive fact giving the husband a title to the property of his wife but no agreement either with the wife or any other person could take away his right to hold and to alienate her property.

This is an illustration which shows that an Equitable right arises in a manner very different from that in which a legal right arises.

(3) Second distinction between a legal right and an equitable right may be formulated thus :

1. A legal right vested in one owner destroys either partially or completely

the right vested in its previous owner. The destruction may be complete or may be partial. If it is a lease, it is a partial destruction. If it is a sale, it is a complete destruction. But whether complete or partial, it is destruction. This is what is meant when it is said that a *vestitive fact* is also *divestive* fact.

2. This is not true when there is a competition between a legal right and an equitable right. An equitable right does not destroy a legal right even when it prevails as against the owner of a legal right. In a conflict between a legal and an equitable right, the equitable right does not destroy the legal right, as one legal right does another legal right.

3. *Why is this so* ? For this it is necessary to know how an equitable right came to be recognised at the very start by the Court of Chancery. The historical setting may be presented briefly as follows:—

(i) It was a common practice in England before the Norman conquest for one person to do something *ad opus*—on behalf of another. For instance the Sheriff seized lands and held them *ad opus domini Regis* or where a knight went about to go to the crusades, conveyed his property to a friend to hold it on behalf of his wife and children. The word *opus* became gradually transformed into *use* and the land transferred came to be spoken of as land put in use.

(ii) Now if in certain circumstances some persons could deal with land on behalf of or to the use of another, the question that inevitably occurred to men, why one person should not in a general way be allowed to hold land to the use of another. This as a matter of fact was exactly what was done in course of time. The tenant *A* would transfer his land by a Common Law conveyance to *B,* who undertook to hold it on behalf of, or adopting the correct expression, to the use of A.

In such cases B was called *the feoffee to use,* that is, the person to whom the feoffment had on certain conditions been made, while *A* went by the name of the *Astin que use,* which being interpreted, meant the person on whose behalf the land was held.

(iii) Reasons why this practice grew, are many. There were altogether six reasons why people liked to follow this practice of putting land in use. Of these two are of importance:—

(1) It enabled a party to escape the feudal burdens to which was liable at Common Law. At Common Law the following burdens were placed upon the tenant—

(i) *Relief—paid* by a new tenant upon the death of an old tenant.

(ii) Aids—payable in three cases—

(a) to ransom the Lord when imprisoned;

(b) when the Lord desired to make his Lord a knight;

(c) when the Lord was obliged to supply his eldest daughter with a

dowry.

(iii) Escheat—The commission by a tenant of a crime serious enough to amount to felony caused the land to escheat.

(iv) *Wardship.*—If an existing tenant died leaving as his heir a male under 21 or a female under 14, the Lord was entitled to the wardship of the heir and as a consequence was free to make any use he liked of the lands during the minority without any liability to render accounts.

(v) *Marriage* :—To find a suitable match for an infant ward was the right of the Lord, and if the infant ward refused, the Lord was entitled to compensation.

The feoffor became free by putting his land in use. The burden fell on the person who acquired *Seisin,* namely, the feofee to uses.

(2) The second advantage was avoidance of forfeiture and escheat.

Land held by tenure at Common Law was forfeited to the Crown if the tenant committed high treason, and upon his conviction or on slavery for felony, it escheated to the Lord. These unpleasant consequences were avoided, if a tenant, before embarking upon some doubtful enterprise, had the prescience to vest his lands in a few confidential friends. The deliquent might possibly suffer the extreme penalty, but at least his family would not be destitute.

4. Legal effect of putting lands in use :—

(i) The legal consequence of this practice of putting lands in use is an important point to note. It was to cut off the *cestui que use* in the eyes of the Common Law from all connection with the land. By a conveyance operative at Common Law, he had conveyed his estate to the feofee *to uses* and was, therefore, deprived of all Common Law rights over the land. He was nothing, the feofee was every thing. Instead of keeping scisin,he chooses to rely upon the confidence which he reposed in the feofee.

(ii) If the feofee failed or refused to carry out the directions imposed upon him or if he deliberately alienated the land for his own purposes, there was no Common Law action by which he could be rendered liable.

(iii) If a *cestui que use* was let into possession of the land by the feofee to uses, he was regarded as a mere tenant at will of the *feofee to uses* and could be turned out any moment, and in the event of contumacy could be sued in trespass by the feoffee.

5. The nature of the remedy provided by the Court of Chancery to protect the feofor must be clearly understood :—

(i) The Chancellor could not interfere with the jurisdiction of the Common Law Courts by proceeding directly against the land itself because the absolute title to the land was vested in the feofee by the conveyance. The Chancelllor could not disregard the fact that a feoffee was absolute owner at Common Law by virtue of the Common Law

conveyance called feoffment whereby the land had been transferred to him.

(ii) The Chancellor distinctly recognised the fact that the feoffee was the owner of the land and had a legal right but what he said to the feoffee was this:—

"You have the legal right, I do not take it away from you but I will not permit you to exercise that legal right in such a way as to infringe the understanding on which the feoffor made the feoffment."

(iii) The Chancery in assuming jurisdiction over the *use* left untouched and inviolate the legal right of owner at Common Law. It exercised no direct control over the land. It only regulated the mode and manner of the legal right by imposing upon the owner of the legal right an obligation to observe the condition. The legal owner retained his legal right to own and to possess the land. The Chancellor gave the feoffor an equitable right to demand observance of the conditions of feoffment.

6. This is the explanation of that difference between a legal light and an equitable right according to which while one legal right destroys another legal, either partially or wholly, an equitable right does not destroy a legal right.

7. This is also the explanation of the proposition enunciated by Strahanin *Article 11,* namely, that a legal right or interest issues *outflows out* of the property itself while equitable right or interest issues or flows out of the legal interest and not out of the property.

This is so because the Chancellor did not recognise the right of the equitable owner to obtain possession of property. That right he retained in the legal owner. What he gave to the equitable owner was the right to impose a duty upon the conduct of the legal owner and he did not give him the right to claim the property itself.

Illustration :-(1918). *2K.B.* (Ir.)353—-Graham vs.Mellwaine.

8. The consequences that follow from this fact may be noted:—

(1) Because an equitable right issues out of a legal right and not out of the property:

(i) It cannot be greater than the legal estate out of which it issues. *Illustration:*

Land conveyed to *A* for the use of *B* and his heirs. *A* is the legal owner of the land. *B* is the equitable owner.

But land is conveyed to A and not to A and his heirs. Consequently the legal right of *A* vanishes at his death. As *A's* legal right vanishes so does *B ' s* equitable right

An equitable interest cannot survive the legal interest out of which it flows, *(1914) i Ch. 300*

(ii) Equitable right will be affected by all the infirmities attaching to the

legal right

A died intestate leaving B and C as his sons, B being the eldest.

B being away C takes possession and transfers it to *D* for the use of his wife *E.*

B returns and claims the property. The legal title of *D* comes to an end by reason of the flaw in C's title.

The equitable estate of *E*, the wife of C, also comes to an end.

III. The third difference between a Legal Right and an Equitable Right is that, a legal right may be a right in *rem* or may be a right in *personam.* But an equitable right is always a right in *personam.* Who is bound to respect the right of an Equitable owner ? Not the world but the legal owner and no one else.

It is true, the legal owner, who is bound, is not the legal owner against whom the equitable right first arose but includes also every legal owner to whom the right is transferred.

All the same the proposition stands that an Equitable Right is a right in *personam* which binds only the legal owner.

Explain,

"Equitable rights have a resemblance to rights in rem."

(i) It is true that Equitable Rights have a resemblance to rights *in rem.*

(ii) How does this resemblance arise ?

(i) An equitable right will be enforced not only against the owner of legal right but it will be enforced against:—

(a) his representatives and volunteers claiming through or under him,

(b) persons who acquire the legal right

(i) with the knowledge of the legal right,

(ii) against those who could have had knowledge.

(iii) The standard of knowledge set up by the Court of Chancery was so high that no one could escape and every purchaser was bound.

Equitable Priorities

1. An equitable right is a right *in personam*—operating against the owner of a legal right out of which it flows.

2. There may be two equitable rights flowing out of one legal right. Both would be rights in *personam* against the owner of the legal right out of which they flow.

3. An equitable right being a right in *personam* arising out of the legal and not out of the property which is the object of the legal right, could be defeated by transferring the legal right to a new owner. Or another equitable right may arise by this transfer which may defeat the prior equitable right.

4. The question to be considered is, in what cases can such a transfer defeat an equitable right ?

5. The subject is discussed generally under the heading of *Equitable*

Priorities. It is so designated because the test applied for the determination of the issue is the priority in time. But the real subject matter is the possible cases where an equitable right can be defeated by transfer of a legal right out of which it arises or by the creation of another equitable right out of the same legal right ?

6. Cases to be considered fall under two classes :

(i) Cases where there is a conflict between Legal Right and an Equitable Right

(ii) Cases where there is a conflict between two equitable rights.

7. Under the first class of cases there are two contingencies which must be distinguished :

(a) Where the 'Equitable Right is prior in existence to the legal right

(b) Where an equitable right arises subsequently to the legal right.

Mrs. Thorndike was the beneficiary of a certain Trust Fund of which C was a trustee. In a suit by Mrs. Thomdike, the Court directed the Trustee to transfer of the fund into the Court for the purposes of the Thorndike Trust and was held by the Administrator. It appeared that the Trustees against whom the order was made had provided themselves improperly with the means of discharging themselves from their personal liability to bring the fund into Court and that there are third persons whom they had injured. The third party so injured filed a suit praying that the fund held in the name of Thorndyke should be transferred to them. *Contention :* Legal title not in Mrs. Thorndyke and therefore, her right could not prevail. Contention disallowed. Held, not necessary to acquire legal title personally. Also no notice.

8. Altogether we shall have three questions to consider which may be formulated thus :

(i) Whether a person who acquires a legal right will be subject to a prior equitable right ?

(ii) Whether a person who has acquired a legal right will be postponed to an equitable right arising subsequently.

(iii) Where neither party has a legal right and both have only equitable rights, which of them will have priority ?

(i) Whether a person who has acquired a legal right will be subject to a prior equitable right?

1. The answer to this question is this:

A purchaser obtaining a legal estate for valuable consideration and without notice of a prior equitable right will not be bound by the equitable right.

2. There are three important elements in this proposition :

(1) *Purchaser must have acquired a legal Estate.—-There* is not much to be said about this. But the following points may be noted:

(a) It is not necessary that he should acquire the legal estate personally. It is enough if somebody does it on his behalf.

Thorndike vs. Hunt, (1859) 3 De. G. 1. 563 =44 ER. 1386.

(b) The purchaser's title need not be *a perfect title.*

Illus. : If a trustee's title to property is defective, he may never the less convey to a *bonafide* purchaser an interest which will be effective against the beneficiary who is the owner of a prior equitable right.

Jones vs. Powles (1834) 3 My & K.581.

Facts

1. *John Jones* Owner—Mortgaged his house to Holbrook, redeemed it, obtained acknowledgement of payment—- but did not obtain reconveyance. The legal estate remained outstanding in Holbrook.

2. On the death of Jones Meredith, his shop assistant forged a will of Jones and on its vests obtained possession of the house.

3. Meredith mortgaged it to Hall by a conveyance.

4. Meredith died leaving his wife to whom he left the equity of redemption by a will and thereafter to James Jones.

5. James Jones conveyed it to Watkins.

6. James Jones & Watkins became partners and mortgaged the property to *Powles* who acquired possession as mortgagee.

7. Powles died leaving his wife *Sarah.*

8. Sara Powles secured surrender of the estate and full ownership.

9. Sara Jones sued Sara Powles alleging that the will was a forgery and that Sara Powles had notice and that she could not defeat her right to redeem. (c) The purchaser should obtain a legal right. But this may be:

(i) at the time of his purchase, or

(ii) he may get it subsequently.

(ii) The purchaser must have given valuable consideration for his right.

A volunteer is always subject to an equitable right. The reason is that he does not suffer by being made liable to the prior equitable right not having paid any consideration.

An existing debt is, however, sufficient consideration.

Illus. Thorndike vs. Hunt.

T had paid no consideration. His right was a sort of an existing debt against the trustee.

(iii) The purchaser must have acquired the right without notice of the existence of the prior equitable right.

This is the most (important)* element in the proposition and the question that arises for consideration is: (further portion not found—ed.)

What is Notice ?

1. Notice may be *Direct* or *Imputed,* Direct notice is notice to the purchaser himself. Imputed notice is notice to the agent of the purchaser.

2. Direct Notice may be *actual* or *constructive :*

(1) Actual notice is where the matter is *within* the knowledge of the purchaser or his agent.

(2) Constructive notice (is)* where it would have come to his own knowledge or to the knowledge of his agent if proper inquiries had been made.

Actual Notice

1. If reliance is placed upon actual notice to defeat a legal right it must be proved that :

(i) It was given by a person interested in the property ;

(ii) it was given in the course of negotiations ;

(iii) it was clear and distinct.

Constructive Notice

1. Constructive Notice arises where there is notice of a fact or facts from which notice of the existence of an equitable right could be presumed. It is not notice but evidence of notice.

2. There are three varieties of constructive notice :

(i) Where there is actual notice of a fact which would have led to the notice of the existence of the right, *Bisco vs. Earl of Banbury (1676) 6) 7 Ch. Ca. 287.*

The purchaser had actual notice of a specific mortgage but did not inspect the motgage-deed which referred to other rights and encumbrances.

He was held to be bound by other encumbrances for he would have discovered their existence if he had inspected the deed as any prudent man would have done. *Davis vs. llutchings, 1907 I Ch. 356.* .

A trustee transferred a share of the beneficiary to the Solicitor relying upon the statement made by him that it was assigned. They did not call for the assignment. The assignment was subject to a charge in favour of another. *Held* they had constructive notice of the charge.

Occupation of tenant as Constructive Notice

Where land is in the occupation of some one other than the vendor, the fact of the occupation gives the purchaser constructive notice of any right of the occupying tenant.

It will not amount to notice of a third person's right—9. Moo. *P. C.* 18.

We now come to the parole evidence of notice. Upon this subject the rule is settled, that a purchaser is not bound to attend to vague rumours about purchaser—to statements by mere strangers, but that a notice in order to

be binding must proceed from some person interested in the property—
R. 3 Ch. App. 488 *Lloyd* vs. *Banks* Carries j—1868
If he attempts to prove knowledge of the trustee *Aliunde,* the difficulty which this Court always feel in attending to what are called casual conversations or in attending to any kind of intimation which will put the trustee in a less favourable position as regards his mode of action than he would have been in if he had got a distinct and clear notice from the encumbrances. At the same time I am bound to say that I do not think it would be consistent with the principles upon which this Court has always proceeded, or with the authorities which have been referred to, if I were to hold that under no circumstances could a trustee without express notice from the encumbrancer be fixed with knowledge of the encumbrance. — *Illus. .- 9 Moo. P. C. 18 Barnhart vs. Greenshields.*

Where it was held that vague reports from persons not interested in the property will not affect the purchaser's conscience.

Should notice be directly from the Encumbrancer ?

A purchaser cannot safely disregard information, from whatever source it may come. It is of such a nature that a reasonable man of business would act upon that information even if it came from a news-paper report.

S*.R. 3 Ch. App. 488* 1868.

Registration

The registration of any instrument or matter required or authorised to be registered by law is to be deemed to constitute actual notice of such *instrument* or *matter* but not necessarily of its contents.

(ii) Where inquiry is purposely avoided to escape being bound by notice.

1. John Towsey contracted for the purchase of certain property in 1776.
2. He borrowed the amount of purchase money from one Dr. P, and placed the title-deeds in his hands as a security for repayment.
3. In 1790, T was very much indebted to one Ellames in a considerable sum of money and executed a mortgage of the same property to Ellames.
4. Dr. P did not give any information of his claim to Ellames.
5. Ellames said that he made no inquiries after the title-deeds before he took the security, and admitted that upon executing the mortgage he inquired for them, and was informed of their being in the hands of Dr. P. but that he understood them to be so for safe custody only.
6. He received this information from one J. who was his brother-in-law, who had prepared the mortgage and appeared as his agent at the time of the execution of it.
7. Dr. P claimed priority over Ellames. It was granted as Ellames was held to have had notice.

(iii) Where there is gross negligence in not making usual and proper inquiries:

1899. 2 Ch. 264

1921. I Ch. 98.

Imputed Notice

1. The underlying theory of agency is that a man can do a thing by an agent which he can do himself. Conversely, what is done by the agent is done by him. This being so, it is open to argument that what is known to the agent must be taken to be known to the Principal. This is the theory on which the doctrine of imputed notice is founded.

The Essentials of Imputed Notice

1. *The knowledge must have come to him as an agent* and not in any other capacity. In other words, agency must be strictly proved.
Dyllie vs. Pollen—32 L. J. Ch. 782 (N. S.)

2. Agent must be distinguished from a person employed to do merely ministerial act—*e.g.* a person employed to procure a deed is an agent.
Knowledge to such a person cannot be the basis of imputed notice.
3. In this connection, the position (of)* a person who is in the service of two Principals as their agent has to be considered. Suppose, there are two companies, A and B, and C is an officer employed in both A & B. Suppose that A company transferred their legal right to B company which was subject to an equitable right in favour of D of which C had knowledge.
Can D say that B company had notice of his equitable right because C, their agent, had notice of it in his capacity as the agent of A?
The answer is that, his knowledge which had acquired as agent of A company, will not be imputed to B company unless he owes a duty to the A company to communicate his knowledge and also a duty to the B company to receive the notice.
(1896) 2 Ch. 743—In *Re Hampshire Land Company. Facts:*

1. Hampshire Land Company was registered under the Companies Act, 1870.
2. The Company was closely interconnected with the Port Sea Island Building Society. Four Directors and a Secretary by name Wills were common to both.

3. On the 19th February 1881, a general meeting of the Company was held at which a resolution was passed authorising the Directors to borrow 30,000 £.
4. The Directors borrowed this amount from the Port Sea Society.
5. The Society went into liquidation in 1892. The Liquidator of the Society sought to claim the sum of £ 30,000 lent to the company.
6. It was contended that the resolution of the company authorising borrowing was *ultra vires* and that because William, the Secretary was a

common officer notice to him was notice to Society and therefore Society could not recover.

7. *Held* that the Society could *recover* for reasons at p. 749.

II. The notice to the agent must have been obtained by him *in the same* transaction and not *in a previous* transaction.

There is a further qualification. Even if the notice was acquired by the agent in the *same* transaction, it will not be imputed to the purchaser, unless it is so material to the transaction as to make it the duty of the agent to communicate it to the principal.

(1886)—31 Ch. D. 671—In Re Cousins.

Facts :

1. In 1871, one William's cousins made a will of his property and left it in trust to his trustees.
2. One William Banks was a solicitor for the trustees.
3. Mathew, a cousin was to receive a share in the proceeds of real and personal property left by William's cousins under the will.
4. Mathew mortgaged his share to William Banks, the Solicitor as security for a loan of £ 35.
5. In 1873, Mathew mortgaged his share to William Richardson through Banks and Banks was paid off.
6. In 1874' Richardson transferred his mortgage to William Drake. No Notice was given to the Trustees.
7. In 1875 Mathew mortgaged his share to Dennis Pepper to secure a payment of £ 500. Banks acted as the Solicitor. The mortgage to Dennis Pepper did not mention the previous mortgage to William Drake. Subsequently a notice of this transaction was given to the Trustee.
8. Drake took out a summons for payment of his mortgage debt due from Mathew out of the funds in the hands of the Trustee in *priority* to Pepper's claim. *1884. 26 Ch. D. 482*
9. Pepper's contention was that, he had no notice of Drake's claim—Mathew not having mentioned it in his deed of mortgage.
10. It was replied by Drake that Pepper had notice because Banks, the Solicitor who acted as his agent knew of Mathew s mortgage to Drake.

II. That Banks had notice, it was not denied. That Banks was the agent of Pepper was not denied. But the question was whether notice to Banks can be held to be notice to Pepper.

12. *Held:* No—p. 677.

Reasons. The knowledge of Banks did not arise in the course of the transaction with Pepper in 1875. Pepper could not be said to have any notice.

13. Pepper's claim was allowed.

III. Notice to agent will not be imputed to the purchaser when the agent is shown to have intended a fraud on the principal which would require the suppression of his knowledge and not communicate it to the Principal.
(1880) 15 Ch. D. 629 Cane vs. Cave.
(1428) ACI—Houghton & Co vs. Nolhard)
II. *Where an equitable right has come into being subsequently to the acquisition of a legal right.*

1. Leading case on the question is *Northern countries of England Fire Insurance Co.* vs. *Whip?.*

1884 26 Ch. D. 482

Facts
C, the Manager of a company, executed a legal mortgage to his company, delivered title-deeds. They were kept in a safe of the company, the key to which was in C's possession. C— some time after took out the title-deeds and created another mortgage on the same property in favour of Mrs. Whipp. Mrs. Whipp has no notice of the first mortgage to the Company. *Held:* Company entitled to priority.
2. The proposition laid down in the case is this—
Where the owner of a legal estate has assisted in or connived at the fraud which has laid to the creation of a subsequent equitable estate and the owner of equitable estate had no notice of the prior legal right, the Court will postpone the legal estate to the equitable estate although it is subsequent in its origin.
3. What is the evidence of assistance in or connivance at fraud:
(i) Omission to use ordinary care in inquiry after title-deeds.
(ii) Failing to take delivery in title-deeds are treated as evidence of assistance in or connivance at fraud where such conduct cannot otherwise be explained.
4. The same authority lays down another case in which also a legal estate will be postponed to a subsequent equitable estate.
Where the mortgagee, the owner of the legal estate has constituted the mortgagor, his agent with authority to raise money on the property mortgaged and the estate created has by the fraud or misconduct of the agent been represented as being the first estate.
5. For the operation of this rule, mere carelessness or want of prudence on the part of the legal owner will not be a sufficient ground. There must be fraud and connivance at or assistance therein. Nothing but fraud I will postpone.

(1913) 2 Ch. 18.

III. Where the competition is between two equitable rights.
1. In the two former cases the competition was between a legal right and an equitable right. In the third case the competition is between two

equitable rights.
Cave vs. Cave. (1880) 15 Ch.D. 639.

Facts :
A Trustee *&B* a beneficiary.
A purchased land from trust-monies in breach of trust and exe-cuted a legal mortgage thereof to *C.*
C had no notice of the trust.
Later by an equitable mortgage transferred the same land to There are three persons who have acquired rights. C, who has a legal right, is mortgagee, being a legal mortgage.
B has an equitable right flowing out of A's right which has been transferred.
D has an equitable right flowing out of A's right.

What is the position of the parties ?

1. As between *C* and B, although B ' s Equitable right is prior to C's legal right as C had no notice, C takes priority.
2. As between *C* and D, C takes priority, because C is not party to a fraud in creating the rights of D.
3. As between *B* and *D,* their rights are equitable rights : whose right prevails? B ' s right. The rule is that where there is a competition between two equitable rights, the right earlier in origin prevails over the subsequent right.
4. This rule applies only where the equitable rights have equal equities on their side. If the equities are unequal, the better of the two prevails.

Rice vs. *Rice.* 2. Drewry, 73 (76-78).

A sells land to *B* and without receiving purchase money (1) conveys land to B, (2) signs a receipt for money s and (3) delivers title-deeds to B. *B* subsequently mortgages the property to *C* who has no notice *of A's* claim. Between *A* and *C* although *A's* equitable right is earlier than that of C, yet the equities are unequal. *A* is guilty of negligence, therefore, *C's* Equity is better and will prevail although later in time.
5. In some cases conflict as to priority between two equitable interests by the respective times at which the interest was transferred. In other cases, it is determined by the respective times at which written notice is given to the proper person or persons of the interest transferred (e.g. in the case of the assignment of chose in action).
Sum up. Three maxims of Equity.

1. Where equities are equal, the law prevails.
2. Where equities are equal, the first in time prevails.
3. Where equities are unequal, the better equity prevails.

Explanation

1. The first proposition has reference to cases where there is conflict between an equitable right and a legal right and applies to both classes of cases : (1) where the equitable right is prior to the legal right as well as to cases (2) where the equitable right is subsequent to the legal right.
2. Law prevails means that legal right prevails over an equitable right where no inequity can be attributed to the owner of a legal right. — Such as notice or fraud.
3. Propositions two & three have reference to cases where there is a conflict between two *equitable rights.*

Equitable Assignment

I. General

1. Although the subject is called Equitable Assignment, it is an abbreviation. The subject is equitable assignment of a chose in action.
2. There are three matters of a preliminary character which must be dealt with at the outset:
(1) What is an assignment.
(2) What is a chose in action.
(3) Necessity for the study of the subject

(1) What is an assignment

1. Under the English Law of Property, property is classified as *Realty and Personality.*
2. In connection with the transfer of rights over Realty, the word used is *Conveyance.* In connection with the transfer of rights over Personality, the word used is either *Transfer* or *Assignment.*
3. Assignment, therefore, means the transfer by a person of his rights over personal property and particularly one form of it, namely, *chose in action.*

(2) What is a chose in act on

1. Under the English Nomenclature, Personality is divisible into two classes:

(i) Moveable goods of which one can take physical possession.
(ii) Personal rights of property which car only be claimed or enforced by action and not by taking physical possession.

2. The former are called :
(i) Chooses in Possession—Things in Possession. (ii) Choses in Action—-Things in Action.

3. The definition of a chose in action—
(1902) 2 K.B. 427 (430) ChannellJ. It is really speaking a debt.
4. The word assignment is used in respect of chose in action. It is something which you can only sign it away if you want to transfer it. You cannot deliver possession of it.

(3) Necessity of Studying Equitable Assignment

1. An assignment is a transfer of a right by its owner, subsisting against another, to a third person to whom the person against whom it was subsisting, becomes bound.

Illustration. A is creditor. *B* is debtor. *A* assigns his right to debt against *B* to *C :B* becomes bound to *C* and *C* gets a right to recover it from *B.*

2. Three persons are involved in an assignment :

(i) The original owner. (ii) The person bound to the original owner. (iii) The person to whom the original owner has transferred the right.

3. The right, i.e., the chose in action may be legal or equitable such as a legacy or an interest in a trust fund.

4. Assignment of a chose in action was differently treated by Equity and by the Common Law.

Common Law and Chose in Action

1. There could be no assignment in Common Law of a Chose in action. Not only there could be no assignment of an equitable chose, there could be no assignment even of a legal chose.

2. The reason was the fear of multiplicity of suits.

3. Statute law and Special law made certain kinds of Choses of action assignable:

(i) Negotiable Instruments became assignable by the law merchant

(ii) Policies of Life Insurance and Marine Insurance were made assignable by Statute.

(iii) Section 25(6) of the Judicature Act: all legal Choses in Action have been made assignable.

Equity and Chose in Action

1. In Equity, a chose in action was always assignable. Not only an equitable Chose was assignable in Equity but a legal Chose was also assignable in Equity.

2. If the Chose was equitable, the assignee could bring his proceedings to recover it in a Court of Chancery in his own name.

3. If it was a legal Chose, the proceedings had to be taken in the name of the assignor and the way the Court of Chancery interfered, was to restrain the assignor from objecting to this use of his name on the assignee giving him a proper indemnity against costs.

4. There were, however, some Choses in action to the assignment of which equity did not give effect on the ground of public policy:

(i) assignment of pay and half pay of public officers paid out of the National Exchequer.

(ii) Assignment of alimony to a wife.

(iii) Assignment affected by maintenance of property.

Conclusion

1. There are thus two ways of making an assignment—

(i) Legal, (ii) Equitable.

2. Although the Judicature Act has laid down the form and procedure for the legal Assignment of a legal Chose, it has not abrogated the rules of Chancery relating to Equitable assignment of a legal Chose. So that if an assignment is ineffective in law by reason of some defect, it will be good if it conforms with the rules of equity. Secondly, the Judicature does not touch the assignment of an Equitable Chose in action.

Categories of cases to be considered

There are three categories of cases to be considered in connection with the assignment of a Chose in action :

(i) Legal assignment of a legal Chose in action.

(ii) Equitable assignment of a legal Chose in action.

(iii) Equitable assignment of an Equitable Chose in action.

Requisites of a legal assignment of a Legal Chose

1. Assignment must be *absolute, i.e.,* it must amount to a *complete* divesting of his right by the assignor. The debt must be certain and must be of the whole amount.

2. The assignment must be in *writing* signed by the assignor. It need not be by deed. It need not be for value.

3. Express notice must be given to the debtors of the assignment.

The Section does not say :

(i) By whom is notice to be given—by *the* assignor or assignee.

(iii) At what time notice is to be given so that it may be given by the assignee after the death of the assignor.

Effect of Want of Notice

1. Absence of notice does not disentitle an assignee of suing on the assignment. It only imposes certain disabilities and results in certain disadvantages.

(i) The assignee cannot sue the debtor in his own name without making the original creditor a party to the action.

(ii) The assignee will be subject *to* equities arising between the debtor and his original creditor before the date of the assignment and will lose his right against the debtor altogether if the debtor pays the original creditor. On the other hand, if the debtor pays the original *creditor* after receiving notice of assignment, the *assignee* could still recover the debt from him.

(iv) The assignee, who fails to give notice to the debtor of his assignment, will be postponed to a subsequent assignee for value who has no notice of the previous assignment, and gives notice of his assignment to the debtor.

Requisites of an Equitable assignment of a Legal Chose in action

An Assignment which does not comply with the statutory requirements is not necessarily ineffectual, for it may operate as an Equitable Assignment. Two things are necessary :

(1) There must be value given by the assignor.
(2) A charge created by agreement between the debtor and the creditor upon specific funds or by an order given to the creditor upon a person holding money belonging to the debtor, will amount to an assignment.
1839. *Burn vs.Carvallo 4 Hylve & Craigs Reports. 690*

Facts
F was in the habit of sending consignments of goods to *R,* who was trading in a different town and used to draw Bills of Exchange upon *R.* It was arranged by *F* with *B & Co.* that they should endorse and negotiate his Bills drawn upon *R* against consignment and they were to credit him with the amount and he was to draw upon it and *B & Co.* was reimburse itself by recovering the amount from *R. F* drew for certain amounts on *B & Co.* But *R* failed to meet the Bills on maturity.
F, who was the debtor of the *B & Co.* by a letter to *B & Co.* promised that he would direct and by a subsequent letter did direct to deliver the goods to *V* as the agent *of B & Co.*
F wrote to *R* to transfer the goods in his possession to *V*, the agent of B & Co. in the town. *R* accordingly delivered the goods to *V* on the 30th of June 1829.
On the 23rd of June 1829, F was adjudged insolvent for an act done on the 23rd of May 1829. His trustee in bankruptcy sued for the recovery of the value of the goods from *B & Co. B & Co.* contended that there was an equitable assignment of the value of the goods by *F. Held* the order of the debtor was a good assignment in Equity.

Rodick vs. *Gandell.*

(1851-2) I Degex.763. 42.E.R.749
Gandell was an Engineer and was indebted to a certain Bank for a large amount and the Bank was pressing for payment.
Gandell was a creditor of a Railway Co. To induce the Bank not to press for payment and also to pay other drafts outstanding against him, it was arranged that Gandell should instruct his Solicitor to recover the amount due to Gandell from the Railway Co. and pay it to the Bank. G, by a letter to the Solicitors of the Company, authorised them to receive the money due to him from the Railway Co. and requested them to pay it to the Bankers. The Solicitors by letter promised the Bankers to pay such money on receiving it.
Why—no agreement between debtor and creditor. The Solicitor recovered the amount from the Railway Co. but instead of paying it to the Bank, paid it to Gandell. Gandell became insolvent and his property was taken

possession of by the official assignee. The Bank sued for a declaration that there was an equitable assignment by Gandell of his funds claimable from the Railway in favour of the Bank and collected by the Solicitor and the Bank was therefore entitled to recover the amount from the official assignee. *Held.* this was not an equitable assignment. It was not an order given by the debtor to his creditor upon a person owning money or holding funds belonging to the debtor directing the *person* to pay such funds to the Creditor.

There must be *privity* between the *assignor* and *assignee* in order to constitute an equitable assignment. If there is no privity then there is no assignment even in equity.

Consequently, if the Principal directs his agent to collect money owing to the principal and pay it to a third person, such third person is not an assignee in equity if the mandate is not communicated to him. It may be revoked by the principal.

Similarly a Power of attorney or authority to collect money and to pay it to the creditor of the party granting the power does not amount to an equitable assignment. A cheque is not an equitable assignment or appropriation of money in the drawer's Bank.

Hopkinson vs. *Forster, (1874) L. R .19 Eq .74.*

There can be no valid appropriation or assignment if no specific fund is specified out of which the payment is to be made.

Percival vs. *Dunn. (1885) 29 Ch. D. 128*

Whether notice is necessary in the case of an equitable assignment ?

1. An equitable assignment is complete between the assignor and assignee although no notice is given to the debtor.

2. Notice of the assignment should, however, be given to the debtor for two reasons.

(i) If there is no notice, the debtor will be free to pay to the assignor, the original creditor and will not be liable to the assignee. On the other hand, if he pays to the assignor in disregard of the notice, he will be liable to pay over again to the assignee.

Stocks vs. *Dobson (1853) 4 De. G. M & G. II*

(ii) If there is no notice, then the assignee will not be allowed to have priority over subsequent assignee of the same chose in action by the same assignor.

This is called the rule in **Dearl** vs. **Hall** (1823) 1 Rsess 1=S. F. C. p. 57.

Facts:

Peter Brown died and left a Will whereby he made a trust of his personal

estate and of the monies to arise from the sale of his real estate and directed his executors to invest the same and pay interest to his son Zachariah Brown during his life. The income came to about £ 93 a year,

On 19th December 1808, Brown, in consideration of £204 paid to him by William Dearle,assigned a part of his annuity of £ 37. On 26th September 1809, Brown, in consideration of £ 150, assigned another part of his annuity of £27 to Sherring, subject to the assignment in favour of Dearle.

Neither Dearle nor Sherring had given notice of assignment to the executor.

In 1812 Brown advertised the life interest of 93 pounds p. a. in trust funds for sale as an unencumbered fund.

Joseph Hall proposed to purchase it and through his Solicitor investigated Brown's title. He also made inquiries of the executors, who knew of no encumbrance affecting Brown's interest. Thereupon Hall purchased Brown's interest for £711-3-6 and had it assigned to him.

On the 25th April 1812, Hall gave the executors written notice of the assignment to him.

On the 27th October 1812, Dearle and Sherring gave notice of their assignment to the executors.

The executors refused to pay any one of the three until their rights were decided.

Dearle and Sherring brought a Bill in chancery against Hall praying that the income of £ 93 should be applied in satisfying their's before that of Joseph Hall.

Dearle contended that the doctrine *first in time is first in law* should be applied and as he was first he should be preferred to Hall.

Held No. Hall should be preferred.

Judgement of Plumer M. R. S. & C. p. 55

The rule was based on carelessness and negligence to perfect one's claim. But the rule is now absolute and independent of conduct. The assignee who gives proper notice first will be paid first, whether the other assignee has been guilty of carelessness nor not.

Re Dallas. (1904). 2Ch. 385.

The rule in Dearle *vs.* Hall has always applied to assignment of all equitable interests in personality.

To whom notice should be given under the rule in Dearle vs. Hall

1. It must be given to the debtor, trustee or other person whose duty it is to pay the money to the assignor. *Stephens* vs. *Green, (1895) 2 Ch. 148*
2. Notice to the Solicitor will be effectual only if Solicitor was expressly or impliedly authorised to receive it. *(1880) 14 Ch. D. 406.*
3. If there are several debtors or trustees, notice to one is notice to all.
4. Fresh notice to new trustees is not necessary, if notice is given to old

trustees.

What should be the form of Notice

1. Formerly, notice need not be a formal notice and might have been by word of mouth.

2. But since 1925, it must be in writing.

What title is acquired by the assignee by an Equitable assignment.

1. It has always been the rule of equity that the assignee of a thing in action cannot acquire a better right than the assignor had.

2. In other words, the assignee takes it subject to all the equities affecting it in the hands of the assignor.

Roxburghe vs. *Cox, (1881) 17 Ch. D.* 520. So that—

(1). If the Contract between the assignor and the debtor was violable, the debtor can set up the violable character of the contract against the assignee, even if the assignment was for valuable consideration.

(2). If the debtor had a right of set-off against the assignor, the same would be available to him against the assignee.

(3). The assignee is, however, free from equities arising after notice.

A debtor cannot diminish the rights of the assignee such as they are, on the date of notice, by any act done after date of notice.

Assignment of rights to be acquired in future

1. So far, we have dealt with assignments of rights which had accrued when the assignment had taken place.

2. We must consider the assignment of rights to be acquired in future.

3. Example of such rights :

(i) The expectancy of an heir-at-law to succeed to the Estate. (ii) The expectancy of a next of kin to succeed to personality. (iii) Freight not yet earned. (iv) Future Book-debts.

4. At Common Law, they were all void. A man could not assign what he had not got. In equity, they were assignable, if for valuable consideration.

5. Equity treated them not as assignments but as *contracts to assign ,* and when the assignee became possessed of it, he was compelled to perform *his* contract.

6. When the right was acquired by the assignor, the beneficial interest passed immediately to the assignee. But the legal interest remained with the assignor. So that, if the assignor transferred it to a subsequent assignee who gave value and had no-notice of the previous assignment, the title of the subsequent assignee would prevail.

Conversion

1. NECESSITY FOR THE DOCTRINE OF CONVERSION.

1. The English Law had prescribed a different mode of devolution of the

Realty and *Personality* of the owner, if he died *intestate.* His Realty went to his heir and *Personality* went to his *next-of-kin.*

2. That being so, whether the property will go to the heir or to the next of kin must depend upon the state of the property on the date on which the succession opens.

3. Ordinarily there is no difficulty. The actual state in which the property will be found on the material date will determine its devolution. But suppose, circumstances are such that on the date on which the succession opens, land *is to be sold* for money *but is not sold*, or money is *to be invested* in the purchase of land *but is not so invested,* how is the devolution of the property to be determined? If the land is to be treated as land, until it is actually sold, then it will go to the heir. On the other hand, if it is to be treated as money, because it was intended to be sold for money, then although it is land, it will go to the next-of-kin. In other words, the question was whether property was to devolve according to the actual state in which it is found to exist or according to the form in which it was intended to be converted. The answer given by equity was, that property was to devolve, not according to the actual state in which it exists, but according to the form in which it was intended to be converted.

4. This is what is called the **doctrine of conversion.** There would have been no necessity for the doctrine. had there been no difference in the rules of inheritance for Real and Personal Property. This difference is now abolished by Sections 33,45 and therefore, conversion has lost all its importance.

5. In India there is no such distinction in the inheritance of property—Realty to heir and Personality to next-of-kin.

II. THERE ARE FOUR CASES WHICH GIVE RISE TO CONVERSION.

(1) By operation of the law.
(2) By operation of the order of the Court.
(3) By operation of a Contract.
(4) By operation of a direction in a deed or a will.

(1) Conversion by operation of the Law

1. There is only one case in which conversion takes place by operation of the Law. That case is the case of Partners. Under the Partnership Act of 1890, Section 39, every partner has a right to require, that the property belonging to the Partnership shall be sold and the proceeds, after the discharge of all debts and liabilities, shall be divided among the partners according to their shares in the capital. As a result, land which is partnership property is treated as Personality and not as Realty.

2. It is treated as Personality, not only as between Partners themselves and their representatives after death, for the purposes of distribution of the

partnership assets, but it is also treated as personality for purposes of inheritance as between the persons entitled to the property of a deceased partner.

3. The conversion of Realty into Personality under the Partnership Act takes place not on the date of the dissolution of the Partnership or the death of a partner but at the moment when it became Partnership Property.

4. The doctrine of conversion applies to Partnership Realty unless the contrary intention appears. The reason why partnership agreements convert Realty into Personality is, because a partner ordinarily is not entitled on dissolution to any specific part of the partnership property. But there may be a proviso in the partnership agreement permitting a partner to have specific property, in which case conversion will not apply, there being intention to the contrary.

(2) Conversion by order of the Court

1. Where an order is made by the Court for the sale of Realty, the Realty is treated as being converted into Personality for purposes of succession to the estate of the person whose property was ordered to be sold.

Illus. A B C have equal shares in a Realty. The Court orders the sale of the Realty. This order has the effect of converting their shares in Realty into Personality, so that the persons entitled to succeed would be the next of kin and not the heir.

2. The following points must be noted:

(i) The order for sale must be within the jurisdiction of the Court

(ii) It is immaterial whether the purpose for which it is sold will or will not exhaust the sale proceeds. The sale may be merely to pay cost. All the same, if the order is for sale, within the jurisdiction, it will effect conversion

(iii) It is immaterial whether it is actually sold or is merely ordered to be sold. Order for sale is enough to effect conversion.

(iv) Conversion takes place from the dale of the order and not from the date of the sale.

3. There are two cases in which the order of the Court will not effect conversion for the purpose of inheritance.

(i) Where the Court itself makes an order that such change in the nature of the property shall not affect its devolution on death, in which case the sale proceeds will go to the heir and not to the next-of-kin.

(ii) Where the provision of some statute prohibits a change in the nature of the property from affecting its devolution *e.g.* Section 123 of the Lunacy Act, 1890,which provides that if the property of a lunatic is sold, the proceeds will go to persons entitled to them as though it was not sold.

(3) Conversion by operation of a Contract

1. When there is a binding contract to sell Realty, the Realty is treated as part of vendors Personality. Conversely, the interest of the purchaser is treated as Realty, even if he dies before completion.
2. This is, however, subject to one condition. That is, the contract must be one of which specific performance would be ordered by the Court—*34 Ch. D. 166.*
Mere notice to treat does not suffice to bring into operation the doctrine of conversion. There will be no conversion if the contract is abortive or unenforceable.

(4) Conversion under a contract to lease with an option to purchase
A leases certain property *to B* for seven years, giving him by the lease an option to purchase the property at a certain price during the term. *B* exercises his option.

Three questions arise:

(i) Does the exercise of the option effect a conversion ?
(ii) Does it effect a conversion even if the option is exercised after the death of the Lessor?
(iii) From what date does such conversion begin to operate ?

(i) Does the exercise of the option effect a conversion ?
In law, the option given is an offer to sell. The exercise of the option is an acceptance of the offer and when there is an acceptance of the offer, there is a contract. The exercise of the option by respiting in a contract effects a conversion. The answer to the first question is therefore in the affirmative.

(ii) Exercise of the option before the death of the Lessee and after the death of the Lessor.
1. If the Lessee exercises his option *before* the death of the Lessor, i.e., while he is alive, then there is conversion, because the offer conveyed by the option can be legally accepted and a binding contract can arise.
2. If the lessee exercises the option *after* the death, then, on principle, there ought not to be conversion, because there cannot be a contract. An offer cannot be accepted after the person, who make the offer, is dead.
But in *Lawes* vs. *Benett* (1785) 1 Cax 167, it was held that the exercise of the option, even *after the* lessor's death, is good for the purposes of conversion.
3. The rule in *Lawes vs. Benett* being anomalous, is confined in its operation. It is applied as between persons claiming under the lessor. But it is not made applicable as between lessor and lessee.
Illus. A leased certain property to B with an option to purchase. The

premises were insured. They are destroyed by fire *before* the option is exercised by B. B, on exercising the option, cannot claim the insurance money as part of his purchase. That is claim as between A and B (l878)7Ch.D.858, 10 Ch. D. App. 386.

(III) From what date does conversion by contract begin to operate.

1. Conversion becomes operative from the moment when the contract is made.
2. In the case of option to purchase, conversion takes place as from the execution of the lease.
3. For the purposes of profits etc., the property remains real estate until the option is exercised, so that the rents and profits are taken by the heir entitled to Realty.
4. For the purposes of devolution. it is personality.

Conversion by direction of the owner.—Whether contained in a deed or a will.

1. Two things are necessary for conversion by deed or will : (i) There must be a direction to sell or purchase Realty. (ii) There must be some person in existence who can be said to have the right to insist upon the direction being carried out. Conversion is always for the benefit of some person. If there is no person to claim the benefit, then there need be no conversion.
2. In order to effect a conversion, the direction must be imperative. If direction is only *optional* , there will be no conversion and property will be treated as real or personal, according as to the actual condition in which it is found.

NOTE.—For a difference between a direction which is *really* optional and a direction which is *apparently* optional but really *imperative See Earlom vs. Saunders--(1754) Ambler's Reports 241.*

Direction, if it is optional, must be *express.* Otherwise it will always be held to be imperative.

3. Distinction must be made between direction to sell or purchase Realty and discretion as to the time at which sale or purchase shall be made:

(a) If the direction is imperative, mere fact that it is accompanied by discretion, will not prevent conversion having its effect.

(b) If the direction is imperative, the fact that those to whom the direction was given have failed to carry it out, will not prevent conversion having its effect.

4. Distinction must be made between a simple direction to sell or purchase and a direction, the execution of which, is made dependent *on the request* or *consent* of some other person.

In such a case, whether there will be conversion or not, rests upon the construction of the document :

(a) If the intention of the clause is to enable the person named to *enforce the obligation to convert,* then there will be conversion.
(b) If the intention of the clause is *to control the operation of the direction* by making it subject to application, then there will be no conversion until such application is made.
5. Distinction must be made between the *power to convert* and *direction to convert :*

(1892) I Ch. 279.
(1910) I Ch. 750.

A mere **power to convert** is not imperative direction and therefore, there **will be** no conversion, where there is mere power.

Illus.:
A borrowed £ 300 from *B* on a mortgage *of A's* property and gave B power of sale by the terms of which the surplus proceeds of sale were to be paid to A, his executors and administrators.
A died intestate, and after *A's* death *B* sold the estate and there were surplus sale proceeds. *To whom would the surplus go ?*
As this was not a direction to sell, the property would devolve according to its *actual* state at the death of A. At the death of A it was Realty, therefore, the heir was entitled to it. If the sale had taken place during the life-time of A, at the death of A it would be personality and would have, therefore, gone to the next-of-kin.

II. TIME FROM WHICH CONVERSION BY DIRECTION TAKES.
1. This varies according as the direction is contained in a will or in a deed.
2. If the direction is contained in a will, conversion will take place as from the death of the testator.
3. If the direction is contained in a deed, conversion will take place as from the date of the execution of the deed—not withstanding that the trust to sell or purchase is not to arise until after the, settlor's death.

III. EFFECT OF THE FAILURE OF OBJECTS FOR WHICH CONVERSION WAS DIRECTED IN A WILL OR DEED.
1. Two cases must be distinguished: (i) Cases of total failure.
(ii) Cases of partial failure.

(i) Cases of total failure
1. Where there is a *total* failure of the objects *before* or *at the time* when the deed or will came into operation, or before the time at which the duty to convert is to arise, no conversion will take place at all and the property will remain as it was. The reason is that, there is no one who can insist upon the character of the property being altered.

2. The failure must *beprior* failure and not *subsequent* failure.
3. The rule regarding conversion is uniform in the case of total failure and there is no difference between the effects of a direction in a deed and a direction in a will.

(ii) Cases of partial failure

1. Where the purposes have only partially failed, then conversion is necessary to carry out such purposes as have not failed. Consequently the doctrine of conversion would operate and the representative entitled to take the property in the form in which it is directed to be converted.
2. It will be carried out to the extent necessary.

Illus.:

A devises Realty to trustees upon trust to sell and divide the sale proceeds between *B* and C. *B* predeceases A and C survives him. Here, sale is necessary in order that *C* may have what A intended to give him, i.e., money. C will take his share in money.

What would happen to the share of *B* ?

It is money *in fact* and *ought* to go to the next-of-kin. But it will go to the heir because conversion to that extent was unnecessary. Heir takes it but as money.

Illus. :

A bequeaths personality to trustees to invest in the purchase of land for B and C. B predeceases A and C survives him. Here, purchase is necessary in order that C may have what A intended to give him, i.e., land. C will take his share in land.

What would happen to share of B ? It will go to the next-of-kin, because, conversion to that extent was unnecessary. But the next -of-kin will take it as land.

Reconversion

1. Reconversion means annulment or cancellation of prior conversion. It is a reversion or restoration of the notional state of the property to its actual state.
2. Reconversion can take place in two ways :

(i) By act of parties.
(ii) By operation of law.

(1) By act of parties

1. This occurs where a person has the right to choose between taking the property in its converted State or in its actual state.
2. Persons who have a right to make such an election and thereby reconvert property are:—

(1) An absolute owner.
(2) A owner of an undivided share—- without the concurrence of the co-owner in the case of money to be converted into land but not in the case of land to be converted into money. This is because money is capable of apportionment while land is not.
Illus.—(1) Where money is to be invested into land in the interest of *A* and *B* as joint tenants. A can elect to reconvert without the concurrence of B.
(2) Ques :— Can a remainder man effect a reconversion by electing to take it in its actual state ? This is not clearly settled.
(3) This rule of reconversion by act of parties applies where the owner who has aright to elect and thereby to effect reconversion is subject to the limitation that he must not be under any disability.

Infants* and *Lunatics are persons under disability and cannot, therefore, reconvert. But the Court may direct reconversion on their behalf if it is beneficial to them.
Married woman can reconvert if the property belongs to her for her separate use. If it is not her separate property, then she can do so only with the consent of her husband. (4) Evidence of election to reconvert—
(i) express declaration of intention in that behalf;
(ii) conduct amounting to election.

(2) Reconversion by Law
Where a person, who is under an obligation to convert property, is in possession of and absolutely entitled to the property after the obligation has ceased/the property is at home and reconverted without any act on his part. Thus—
A converts within 3 years after his marriage with B to invest £ 1,000 in the purchase of lands and settle them upon his wife *B.* B dies within a year of the marriage. Since the obligation to invest money in land and the right to require its investment are both vested in A, the obligation is discharged by operation of law and the money which was converted into land by the covenant is reconverted and passes to the next-of-kin.

Election

I. DISTINCTION BETWEEN ELECTION IN LAW AND ELECTION IN EQUITY.

(a) *Election in law* is connected with the choice of a party to repudiate a liability arising out of an unauthorised act or to ratify the act and accept the liability.
(b) *Election in Equity* is connected with the choice of a person to accept a

gift which is subject to a burden or to reject the gift.

II. NECESSITY FOR THE EQUITABLE DOCTRINE OF ELECTION.

(i) What is the problem which the doctrine deals with

Nature of the Problem.

A gives his property to B by an instrument-deed or a will—and by the same instrument gives to *C* a property belonging to *B.*

What can *B* take under such an instrument ?

Here there are two gifts—

(i) by A to B of A's property

(ii) by A to C of B's property

The gift *to B* of *A's* property is a valid gift, because A is the owner of the property gifted away. The gift to C of *B's* property by *A* is invalid, because it is not authorised by *B.*

Question is, can *B* take the gift from *A of A's* property and repudiate the gift of his property by A to C ? It is this problem with which the doctrine of Election deals.

(ii) The doctrine of Election says that the gift to B shall take effect only if B elects to permit the gift to *C* also to take effect.

III. THE PRINCIPLE OF THE RULE.

When a person makes a gift of this sort, equity presumes that in such a gift there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming to all its provisions, and renouncing every right inconsistent with it.

(iii) Courses open to a person called upon to elect.

(A) Two courses are open to a person who is called upon to make an election.

(1) *B* may allow C to take his (B's) property and himself take A's property.

(2) *B* may take A's property and not allow C to take his (B's) property but give him compensation to the extent required to satisfy C.

Illus.:

A gives to *B* a family estate belonging to *C* worth £ 20,000 and by the same instrument gives to *C* a legacy of £ 30,000 of his *(A's)* property. *C* can do either of the two things.

(i) allow B to take the family estate *or*

(ii) keep the family estate and give B £20,000.

(B) The former course is called *taking under the instrument.* The latter is called *taking against the instrument.* The following points must be noted in connection with these two modes of Election:

(i) Election against the instrument is allowed in Equity only where the gift

is made upon an *implied* condition that the donee shall part with his own property. Where the gift is made upon an *express* condition that the donee shall part with his own property. Equity will not allow Election against the instrument. The donee would take nothing if he refused to comply with the condition.

(ii) No question of compensation arises when a person elects under the instrument.

(iii) Election against the instrument where it is permitted—does not involve a forfeiture of the whole of the legacy but only of a part sufficient for compensation.

IV. CONDITIONS FOR THE APPLICATION OF THE DOCTRINE

(l) The donor must have given the property of the donee to a third person.

(2) The donor must have by the same instrument given his own property to the donee. To this the following must be added.

(3) The property *given to* the donee must be such that it can be used to compensate the third person.

(4) The property of the donee must be alienable.

NOTE.—The donor will be deemed to be disposing of such interest as he may have in the property and no more.

V. SOME CASES WHICH MUST BE DISTINGUISHED FROM CASES OF ELECTION

(1) Cases of *two* gifts to one person

In such cases the doctrine of election does not apply. They are cases of gifts of his own property.

Here the donee may accept the one that is beneficial and reject the one that *is onerous*—unless the intention of the donor was that the acceptance of the *onerous* was a condition for the grant of the beneficial.

2. Case of *two* properties in one gift.—One beneficial, the other onerous.

The beneficiary must take both or neither unless an intention appears to allow him to take the one without the other.

V I. CONCLUSION

(1) Conversion and election are doctrines which illustrate the maxim of Equity—Equity looks to intention.

(2) That being so there would be no election if there was no intention on the part of the donor to put the donee to election.

1. Performance

1. *The problem :*—A covenants with B to do a certain act. A does an act which can wholly or partly effects the same purpose *i. e.* available for the discharge of the obligation arising under the covenant but does not relate

the act to the covenant. The question is *how is this act to be construed ?* Is it to be construed that it is an independent *act* quite unconnected with the covenant or is it to be construed that the intention of A in doing this *act* was to perform the obligation. The answer of equity is that the *act* must be treated as being intended to perform the obligation under the covenant.

2. *Principle* •—-The principle underlying the doctrine of Performance is that, equity presumes that every man has an *intention* to perform his obligation and when he does an *act* which is similar to the one he promised to do, then equity gives effect to that intention.

3. *The difficulties that would occur if this principle was not recognised.*

Illus :

A convenanted on his marriage to purchase lands of the value of £ 200 a year and to settle them for the jointure of his wife and to the first and other sons of the marriage in fail.

A purchased lands of that value but made no settlement, so that, on his death the lands descended to his eldest son.

The eldest son brought a bill in equity founded on his father's marriage-articles to have land purchased out of the personal estate of the father of the value of £ 200 a year and settled to the uses in the marriage-articles. But for the doctrine of *performance* the man would get both.

II. The cases in which the questions of Performance arise fall into classes:

(i) Where there is a covenant to purchase and settle lands, and a . purchase is in fact made.

(ii) Where there is a covenant to leave personality to an individual arid the covenanter dies intestate and the property thereby comes in fact to that individual.

III. Cases arising under the First Class

(i) Illus. already given.

Points to be noted.

(i) Where the lands purchased are of less value than, the lands covenanted for, they will be considered as purchased in part performance of

the contract.,

(ii) Where the covenant points to a future purchase of lands, lands of which the covenantor is already ceased at the time of the covenant, are not to be taken in part performance:

(iii) Property of a different nature from that covenanted to be purchased by the covenantor, is not subject to the doctrine of Performance.

IV. Cases that fall under the second class

(i) Covenant is to leave certain money.

A covenanted previously to his marriage to leave to his wife £620. He married and died intestate. His wife's share under the intestacy was less than £620.

The wife sued for the performance of the covenant. The question was, having received £ 620 on intestacy, was it not a performance of the covenant. It was *held* that it was, so that the widow could not claim her share on intestacy and £ 620 over and above as a debt under the covenant.

(2) In this case, the covenant was wholly performed. But even if the amount received was less than the amount due under the covenant, the doctrine of performance would apply and the convenant would have been held to be performed *pro tanto. ,* (3) Two points to be noted :

(i) Where the covenantor's death occurs at or before the time when the obligation accrues, there is performance.

(ii) Where the covenantor's death occurs after the obligation has *accrued due,* there is no performance.

Satisfaction

I. *Problem.*—A is under an obligation to B. A makes a gift to B. The Question is : Is the gift to B to be taken as a gift or is the gift to B to be taken as satisfaction of A's obligation to B ?

II. There is a similarity between satisfaction and performance. There are fundamental distinctions between the two.

(1) In performance, the act done is available for the discharge of the obligation, but is not related in specific terms to the obligee. In satisfaction, it is related to the obligee but not in discharge of the obligation.

(2) In performance, whether the covenant has been performed depends, not upon the intention but, upon whether that has been done which was agreed to be done. The question, whether a gift satisfies an obligation, depends upon the intention of the donor.

(3) If an obligation has been performed according to its terms, the obligor is discharged. If an obligor makes a gift by will in satisfaction of his liability, it rests with the obligee either to accept the gift or decline it. If he accepts it, he looses the right to enforce his obligation, if he declines it, he retains his original rights.

II. Intention is that, the gift is in satisfaction of the prior obligation.

III. Cases in which the question of satisfaction arises fall into two classes:—

(i) Cases in which the prior obligation arises from an act of bounty.

(ii) Cases in which the prior obligation is of the nature of a debt.

IV. Class of cases in which the prior obligation arises from an act of bounty.

In this class fall two kinds of cases— (A) Satisfaction of legacies by portion. (B) Satisfaction of portions by legacies.

(A) Satisfaction of legacies by portion

Portion—That part of a person's estate which is given or left to a child.

IlluS.:

A has three sons B, C, D. He makes a will and in that will gives a legacy to each of his sons. Subsequently to the making of his will, A makes an advancement of a certain sum of money.

2. Here, there is a legacy and afterwards a portion. Are they cumulative or are they alternative. Is the child which has got a portion also entitled to get the portion ? Or is the claim for legacy satisfied by the subsequent portion given by the father ?

3. The answer of equity is that, a child cannot get both, legacy and a portion. The claim for legacy shall be held to be satisfied by the subsequent grant of the portion. This is called the rule against *double portions.*

II. *Satisfaction of Portion by Legacies*

1. This is the converse of the first. In the first class of cases, there is first legacy then a portion. In the second, there is a portion first and then there is a legacy.

2. In the former case, the question was whether a legacy by will was satisfied by a subsequent portion, In this, the question is whether the obligation to give a portion is satisfied by a subsequent legacy.

3. The answer here is the same as in the former case. The same rule against double portion applies. So that a portion will be satisfied by a legacy.

4. When the will precedes the settlement, it is only necessary to read the settlement as if the person making the provision had said, " I mean this to be in lien of what I have given by my will ".

But if the settlement precedes the will, the testator must be understood as saying," I give this in lien of what I am already bound to give, if those to whom I am so bound, will accept it ".

5. The same rule applies in the case of a portion followed by a portion.

II. *Limitations on the rule of double portions*

1. The rule does not apply :

(1) In the case of legacy and a portion—where the legacy is *expressed* to be given for a particular purpose and the portion subsequently advanced is for the same purpose.

(2) In the case of portion and legacy, and in the case of portion and portion—where the property is actually transferred to the child and then a provision is made either by way of a legacy or portion—in short it applies only where the first portion is only a debt.

(3) Where the person, who makes the provision is the parent or a person

in loco parentis— If, therefore, a person gives a legacy to a stranger and then makes a settlement on the stranger or *vice versa,* the stranger can take both, the rule against double portion does not apply to him:

(i) An illegitimate child is a stranger;

(ii) a grand child is also a stranger:

(iii) a stranger cannot take advantage of the satisfaction of a child's share.

III. *Cases of two Legacies given by the same will or by a will and Codial.*

1. Question is whether the second Legacy is intended to be additional to the first or to be merely repetition.

2. The leading case is *Hooby vs. Hatton, 1 Bro. C. C. 390 N.* 3'. Two class of cases to be considered separately—

(1) Where the subject-matter of the legacy is a thing.

(2) Where the subject-matter of legacy is money.

4. *Where the subject-matter of the Legacy is a thing,* Rule :Where the same thing is given twice—not additional but repetition.

5. *Where the legacies are pecuniary legacies:*

(1) The rule varies according as the gifts are contained in the same instrument or in different instruments.

(2) Two pecuniary legacies in the *same* instrument.

Rule:

(i) If equal— repetition.

(ii) If unequal—cumulative.

3. Two pecuniary legacies in *different* instrument. *Rule.*—They are cumulative.

Exception—-If same motive is expressed for both gifts and the *same* sums are given—then repetition.

B. Cases in which the prior obligation is of the nature of a debt.

1. Cases may be divided into two classes—

(i) Satisfaction of debt by a Legacy.

(ii) Satisfaction of debt by a portion. (i) *Satisfaction of debt by a Legacy.*

(1) This case arises where a debtor, without taking notice of the debt be queathes a sum by way of legacy to his creditor. Question is : Is the legacy to be taken as satisfying the debt or is the creditor entitled to the legacy and also the debt ?

(2) *Rule*—-That the legacy shall be taken as satisfying the debt.

(3) *Limitation on the Rule.*—The rule does not apply in the following cases—

(i) Where the legacy is of lesser amount than the debt—no satisfaction, even *protanto.*

(iii) Where the legacy is given upon a contingency.

(iv)(iii) Where the legacy is of an uncertain amount— *e.g.* residue. (iv) Where the time fixed for payment of the legacy is different from that at

which the debt becomes due—so as to be equally advantageous to the creditor.

(v) Where the subject-matter of the legacy differs from the debt, *e.g.* land.

(ii) *Satisfaction of debt by Portion.*

(1) Such a case arises where the father becomes indebted to his child and then advances a portion to him in his life-time. The Question is : Can the child claim both—the debt as well as the portion ? Or Is the debt satisfied by the portion ?

(2) *Rule.*—Debt is satisfied by the portion.

(3) This rule is subject to the same limitations.

V. Difference between Performance and Satisfaction.

(Further notes are not available—ed.)

CHAPTER 2

THE DOMINION STATUS

1. The Statute of Westminster to some extent lays down and codifies the law which regulates the constitutional relationship of these parts of the British Empire which is known as the British Common wealth of Nations.

2. The Statute of Westminster applies to the Dominions and establishes for them what is called Dominion Status. Our inquiry will be directed to understand the meaning of Dominion Status. Before approaching the subject we must ask.

I. 1. What is a Dominion ?

A Dominion is a colony which is declared to be a Dominion by the Statute of Westminster.

2. What is a Colony? A Colony is a British Possession other than U. K. and India.

3. What is a British Possession ?

A British Possession is any part of the British Empire exclusive of the United Kingdom over which the King exercises sovereignty.

4. What is British Empire ?

(British Empire) denotes the whole of the territories over which the King possesses sovereignty or exercise control akin to sovereignty. It includes therefore all the King's Dominions, over which he is sovereign, and the protectorates and Protected States whose foreign relations are controlled by the Crown.

It also includes the mandated territories.

II. What is Dominion Status ?

1. The subject could be better under (stood) if we compare the system of Government inaugurated by the Statute of Westminster with the system of Government which was in operation before it came into force.

2. The system which was in operation was known as Responsible Government. We must therefore grasp as a first step the characteristics of Responsible Government.

3. Why Responsible Government came in some colonies and why it did not come in others ?

4. The Government of a colony differed according to the nature of the colony.

5. Colonies fall into two classes :

(1) Colony by settlement

(2) Colony by Conquest or Cession.

(1) Colony by settlement

1. Thus in a colony by settlement there came up the inevitable conflict between an irresponsible executive and representative legislature, a conflict of mandates.

2. Responsible Government had to be introduced in these colonies by settlement in order to solve this conflict.

3. THE NATURE OF THE RESPONSIBLE GOVERNMENT.

The position of the King in relation to settled colonies differs from his position in relation to conquered colonies.

The King stands to possession acquired by settlement in a position analogous to his status in the United Kingdom. *10 App. Calls 6921(744).* He is possessed of the executive power and has authority to establish Courts of law, but not celesiastical Courts *[3 Moo. P. C. 115, 1865 : I Moo P.I.C.C 411, 1863].* But he cannot legislate, and if laws are to be passed. this must be done—

(1) by a legislative body of representative character on the analogy of the U.K.

(2) where this form of legislation would be difficult to carry out, parliamentary authority must be obtained authorising the establishment of a different form of Constitution.

(2) Colonies by Conquest

In these, the King possesses absolute power to establish such executive, legislative and judicial arrangements as he thinks fit, subject only to the condition that they do not contravene any Act of Parliament extending to all British Possession.

But this right is lost by the grant of a representative legislature unless it is expressly retained in whole or in part. If not so retained, power to legislature as to the Constitution or generally can only be recovered under the authority of an Act of Parliament.

1835 2 Kuapp. 130 (152) Jehson v/s Pura ; 1932 A. C. 260.

1. The Statute of Westminister applies to :

(1) The Dominion of Canada,

(2) The Commonwealth of Australia,
(3) The Dominion of New Zealand,
(4) The Union of South Africa,
(5) The Irish Free State,
(6) New Foundland.

2. This statute calls these colonies as Dominions and confers on them what is called Dominion Status.

3. These Colonies had Responsible Government before the Statute of Westminister.

What is the difference between Responsible Government and Dominion Status?

Mechanism of Responsible Government.—

(1) THE CLAIM BY THE COLONY TO COLONIAL AUTONOMY IN MATTERS WHICH AFFECTED THEM.

(2) THE CLAIM TO UNLIMITED SOVEREIGNTY BY THE IMPERIAL PARLIAMENT.

These two claims are contradictory. A self-governing colony is a contradiction in terms.

The solution of this question involved two questions :

(1) How was the division of authority to take place between the Colonial and Imperial Governments.

(2) How were the powers given to each were to be exercised by each.

The division proposed was not along the lines of imperial and colonial legislative competence.

All legislation was to be within colonial competence except what was barred by the colonial laws, but some of it would be liable to veto by the Imperial Government not on the ground that it was beyond the competence of the colonial legislature, but it affected some Imperial interest.

The matters of Imperial concern were not reduced to writing by enumeration. The Imperial Government was free to decide whether any particular matter was or was not of Imperial concern.

The following provisions were a feature of the Constitution of these colonies:

(1) The appointment of the G. and G. G. by the Crown on the advise of the Imperial cabinet

(2) The Right of the G. G. to act otherwise than the advice of his ministers.

(3) The power of the Governor to Reserve Bill for the pleasure of the King on the advice of the Imperial Government.

(4) The Power of Disallowance by the King on the advice of the Imperial Government.

The terms of the Statute of Westminister

I. It frees the Dominion Legislature from the overriding effect of the laws

made by the British Parliament:
(1) It abrogates the Colonial Laws Validity Act.
(2) It gives the Dominion Legislature to repeal any U. K. Act in so far as the same is the part of the Dominion.
II. It puts limitations upon the legislative sovereignty of the British Parliament:
(1) No Act of Parliament passed after December 11,1931 shall extend, or be deemed to extend to a Dominion as part of the law of that dominion unless it is expressly declared in the Act that the Dominion has requested and consented to the enactment thereof.
(2) Any alteration in the law touching the succession to the throne or the Royal Style and Titles requires the assent of the Parliaments of the Dominion as well as of the United Kingdom.

III. The Statute does not alter the other provisions :

(1) The appointment of Governor General.
(2) The Reservation of Bills.
(3) The Disallowance of Bills.
But a great change has taken place in the exercise of these powers.
Right of advice to the Crown.

*Dominion Status does not mean sovereignty,

* * * *

2. Constitution of the United Kingdom has been dealt with.

3. India will not be dealt with here. So also Protectorates and Mandated Territories.
4. Deal only with the Constitutional Organisation of the Colonies.
5. The Constitutional Organisation of the Colonies differs according to the mode of the acquisition of the Colony.
6. Two methods.—
(1) Settlement
(2) Conquest or Cession.

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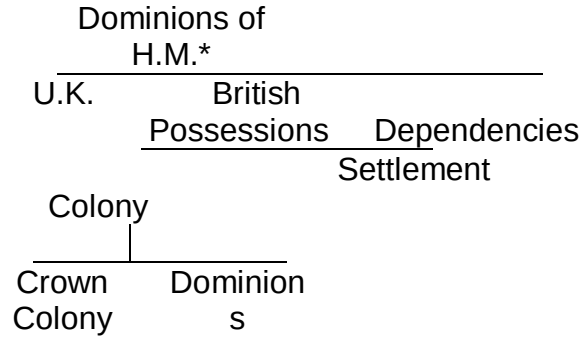

Dominions

1. The Dominion Office was established in 1925 to take over Dominions' business from the colonial office.

2. At first the Secretaryships for the Dominions and for the colonies were held by the same minister, but in 1930 a separate S of S for the Dominions was appointed.

3. The Dominion Office deals with business connected with the Dominions, Southern Rhodesia, the South African High Commission [i. e. Basutoland, Bechunaland, Protectorate Swaziland], Overseas settlement, and business relating to

Imperial Conferences. See Sir G. V. Fiddes—*The Dominions and Colonial Offices.*

Old Halsbury, 1. p. 303. 662. The dominions of the Crown include—

(a) The U. K. and any Colony, plantation, island, territory or settlement within H M's dominions and not within the U. K.

(Naturalization Act, 1870,33 Ne. c 14 s. 17)

(b) Places situated within the territory of a Prince, who is subject to the Crown of England in respect of such territory.

[Crow and Ramsay (1670) Vaugh. 281]

(c) British ships of war and other public vessels *(Parliament V/s. Belge. (1880) 5 P.D. 197.)*

(d) British Merchantmen on the high seas [1870 S. R. 6 Q. B. 31. *Marshall v/s Murgatroyd]* and probably even in the territorial waters of a foreign country [*Compare R v/s Carr and Wilson (1882) 1.0 Q.B.D.* 76].

Halsbury X. p. 503 para 856

1. " British Possession " means any part of H M's dominions exclusive of the U.K.; and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed to be one British Possession. [Interpretation Act 1889 (52 *& 53 Vict.* c. *63) S. 18 (2)].*

2. A Colony is any part of H M's dominions exclusive of the British Islands and British India; and where, parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed one colony [*Ibid.* S.18(3)].

3. A British settlement means any British Possession which has not been acquired by cession or conquest and is not for the time being within the jurisdiction of the legislature of any British possession. [British Settlements Act, 1887 *(50-51 Vic. C.54)* S. 6].

4. The expression ' Dependencies ' is used to signify places which have

not been formally annexed to the British dominions, and are therefore, strictly speaking foreign territories, but which are practically governed by Great Britain, and by her represented in any relations that may arise towards other foreign countries. Most of them are" Protectorates "that is territories placed under the protection of the British sovereign, generally by treaty with the native rulers or chiefs. Cyprus and Weihaiwei are foreign territories held by Great Britain under special agreements with their respective sovereigns, but administered under the Foreign Jurisdiction Act, 1890 [53-54 Vic. C. 37], on the same general lines as protectorates. India including both the Native States and the strictly British territory of that Empire, is frequently spoken of as our great dependency.

5. Crown colonies are those in which the Crown retains complete control of the public officers carrying on the Government, and the legislative power is either delegated to the officer administrating the Government [S. S. Gibralter, Ashanti, Virgin Islands, St. Helena and Basutoland] or is exercised by a Legislative Council which is nominated by the Crown either entirely or partly the other part being elected. In these colonies, with seven exception, the Crown has reserved to itself the power of legislating by Order in Council.

Protectorates although not parts of H M's Dominions are administered in much the same manner as Crown colonies.

Dominions are those colonies which possess elective legislatures to which the executive is responsible, as in the U. K. the only officer appointed and controlled by the Crown being the Governor or G. G.

Halsbury X, p. 521

885. There is no statutory or authoritative definition of the term "protectorate " although it appears in two recent Statutes. Protectorates are not British territory in the strict sense ; but it is understood that no other civilised power will interfere in their affairs. They are administered under the provisions of orders in Council issued by virtue of powers conferred upon H. M. by the Foreign Jurisdiction Act, 1890 "or otherwise vested in His Majesty " which latter phrase may be taken to be intended to bring in aid any exercise of the Royal prerogative that may be necessary to supplement H. M 's statutory powers.

Halsbury XIV, p. 420

For a recent treatment of the meaning of " dominions " see *R v/sCrewe 1910 S.K.B .576,607' ,622.*

Halsbury IX, p. 16

The authority of the King extends over all his subjects wherever they may be, and also over all foreigners who are within the realm. The jurisdiction

of English Courts of Law, however, is limited, first, by the stipulations contained in the enactments by which the kingdoms of Scotland and Ireland were incorporated in the United Kingdom ; Secondly by the Charter of Justice, letters patent and statutes affecting particular colonies ; and thirdly, by the consideration that no English Court will decide any question where it has not the power to enforce its decree.

The jurisdiction of each particular Court is that which the King has delegated to it, and this delegation has been complete, for the King has distributed his whole power of prosecution to diverse Courts of Justice.

Development of Dominion Status

1. There is first the claim to unlimited sovereignty by the Imperial Parliament and Government stated in its logical perfection by Lord John Russell.
2. There is second the claim to colonial autonomy an effective demand that, in matters which interested them, the colonies should manage their own affairs.
3. There is third, the contradiction between the two. A self-governing dependency is a contradiction in terms.

Solution

On the one hand, the Imperial Parliament granted to a colony a sphere of activity in which the colonial legislature, executive and judiciary had authority to exercise governmental power. In this sphere the colony was sovereign.

On the other hand, the Imperial Parliament had the authority and full legal power, as and when it saw fit, to withdraw or limit the rights of the Colony to exercise power within a prescribed sphere, either by repealing or amending the Constituent Act of the Colony or by passing an Imperial Act explicitly applying to some subject within the jurisdiction of the Colony.

Two Questions: (1) How was the division of authority to take place between the Colonial and Imperial authority? (2) The method of exercising the powers given to each.

(1) The division proposed was not along the lines of Imperial and Colonial legislative competence.

All legislation was to be within colonial competence, but some of it would be liable to veto by the Imperial authority, not on the ground that it was beyond the competence of the colonial legislature, but because it affected some specified Imperial interest.

(2) It was advocated that the possible matters of Imperial concern should be reduced to writing by enumeration of those matters which were deemed of Imperial concern. The British Government refused to bind itself specifically in this way [and the provisions were not allowed to stand in the

Australian Bills].

(3) How were the activities of the Colonial and Imperial authorities to be adjusted and co-ordinated so that confusion and overlapping and conflict might be avoided ? The solution was found in the following :

(1) The Powers of Reservations.

(2) The Powers of Disallowance.

(3) The appointment of the Governor General.

(4) The nature of responsible Government in the colonies. (5) Right of the British Government to tender advice to the Crown. (6) Colonial Laws Validity Act of 1865.

(4) The nature of responsible Government in the Colonies.

The executive Government was vested in the Governor, who was empowered to appoint to his executive council those persons whom he thought fit, in addition to those,if any, who by law were members of it. While in one or two cases it was stipulated in the Constituent statute that ministers were to be members of the executive council or that members of the executive council were to be, or were within a given period, to become members of one or other house of the legislature. In no case is the executive council required bylaw to be composed of ministers and ministers alone.

The executive council includes but does not necessarily consist only of ministers. In certain cases there is no legal necessity for members of .the executive council to be members of either house of legislature.

The Act prescribed a sphere of activity within which the colonial legislature had power to make laws for the peace, order and good Government of the colony. Thus far the statute.

The instructions to the Governor empowered him to govern with an executive council whose advice he might disregard if he thought fit.

Responsible Government was based, not upon a statutory basis, but on the faith of the Crown.

Character of InterImperial Relations

In the Commonwealth Merchant Shipping Agreement, the Dominions appear in a position of complete equality, comparable with that of contracting states, and differences arising out of the agreement would seem suitable for reference to the inter-Imperial tribunal contemplated by the Imperial Conference 1930. [Cmd. 3994, Part VII].

But the relations are not governed by International Law. This was asserted clearly in 1924, when the Irish Free State registered with the Secretariat of the Leagus of Nations, the Articles of agreement for a Treaty of December 6, 1921 on the score that it was a treaty within the meaning of Article 18 of the covenant of the League of Nations, and the British Government insisted that neither the covenant nor the conventions concluded under

League auspices were intended to govern relations *inter se* of parts of the Commonwealth [Keeth. R. G. II. 884, 885.]

The Imperial Conference 1926, took this view, holding that it had been determined in this sense by the Legal Committee of the Arms Traffic Conference of 1925 [Cmd. 2768 p. 23.]

The Dominions save the Irish Free State as well as the United Kingdom, excluded inter-imperial disputes from those to be submitted to the Permanent Court of International Justice when accepting the optional clauses of the Statute of the Court in 1929 [Cmd. 3452 p. 415] and similarly when accepting the General Act of 1928 for the Pacific Settlement of International disputes [Cmd. 3930 pp. 14, 15].

The inter-imperial preferences are a domestic issue, on which most favoured nation clauses of treaties with foreign states do not operate.

Allegiance

The bond of a common allegiance involving a common status as British subjects, and this bond is one which cannot be severed by the unilateral action of any part as follows from the formal declaration in the Preamble to the Statute of Westminister that inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and as they are united by a Common allegiance, any alteration in the law touching the succession to the throne or the Royal style and titles, requires the assent of the Parliaments of the Dominions as well as of the United Kingdom.

While the Preamble does not make law, it expresses a convention of the constitution which would render it very difficult for the Crown or its representative to assent to a bill passed by any single part which violated this principle of the unity of the British Commonwealth of Nations on a basis of equality of its status.

Note.— In approving the report of the Conference of 1929, the Union Parliament recorded that the proposed Preamble "shall not be taken as abrogating from the right of any member of the British Commonwealth of Nations to withdraw therefrom ".

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But this view has never been formally adopted by the Imperial Conference.

The equality of status of the Dominions and the U. K. necessitates the consideration of a mode of deciding inter-imperial disputes [cmd.3479 p. 41].

For this purpose, the imperial conference 1930 decided that such disputes should be dealt with along the line of *ad hoc* arbitration, on a voluntary basis. The procedure is to be limited to differences between Government

and only such as are justifiable.

The Tribunal is to be constituted *ad hoc* for each dispute ; there are to be five members, none drawn from outside the British Commonwealth of Nations.

Each party shall select one from the States members of the Commonwealth of Nations, not parties to the dispute, being persons who have held or hold high judicial office or are distinguished jurists and one with complete freedom of choice. The chairman shall be chosen by these four assessors may be employed if the parties desire-expenses to be borne equally. Each party shall bear those of presenting its case.

External Sovereignty of the Dominions

They have autonomy. But not status. (They Have) ceremonial status, but not *legal , de facto* but *not de jure*

For many purposes the Dominions are endowed with a considerable amount of international personality independent of the United Kingdom. But the Common allegiance and the Common Crown interfere with the idea of each Dominion being a distinct sovereign state connected merely in a personal union.

The issue as to the possibility of neutrality in war has been discussed, but only claimed by the Nationalist Government in South Africa. [Kerth DGII 867 868 71, 72, *Sovereignty of Dominions of D. 300-304 463-471].*

It is open to serious doubt if the King could declare war without automatically involving the Dominions in the war.

The implications of Dominion Status

1. Does it imply sovereign status ?

They have the functions of a sovereign state. But they have not the status of sovereign states.

2. Does it imply the right to secede ?

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Right of aliens to enter British territory, p. 27
Subject—compulsion of, to leave the Realm p. 388
Citizenship and allegiance
Vol. XVII p. 270
Vol. XVIII p. 49
Law of citizenship in the United States
by
Prentiss Webster
Albany :1891

Webster

"The distinction between citizens proper, that is, the constituent members of the political sovereignty, and subjects of that sovereignty who are not, therefore, citizens is recognised in the best authorities of the public law ". This distinction is true. The further question of who are and who are not citizens has its difficulties. Accept the definition of citizenship to be the enjoyment of equal rights and privileges at home and equal protection abroad, and consider the question from this standpoint, from which alone it should be treated, for we have no law in the U.S. A. which divides our citizens into classes or makes any difference whatever between them. We then discover the importance that the equal rights of citizens when at home should maintain when abroad, because questions as to citizenship are determined by municipal law in subordination to the law of Nations. Therefore, the value of citizenship should not be underestimated. "

Webster

View of Roman Law

1. It was by man that the body politic was organised, and in entering the Organisation with his fellow men, man followed the exercise of his natural rights and became an ingredient of the society of which he, with others, became members.
2. By the Organisation formed as of man and by man, man was so incorporated into the body politic that he could not depart.
3. Although in the early days of Rome, they alone could call themselves Roman citizens who were freeborn and born in Rome, yet very soon thereafter, foreigners were admitted to citizenship by authority of the legislative body. Later, as Rome advanced in her conquest of the neighbouring states, to these states the legislative authorities conferred charters by which the citizens of such states were admitted to Roman citizenship and their former citizenship was abolished.
4. Cicero lays down the rule, " that every man ought to be able to retain or renounce his rights of membership of a society, " and further adds, " that this is the firmest foundation of liberty. " Under this the Romans received all who came and forced none to remain with them.
5. This view of the Roman Law was based upon natural law.

Effect of Invasion

6. After the downfall of Rome this principle of natural law gave way to the principles of feudalism as introduced by the invaders.
7. The invaders having conquered both the people and their lands, organised their Government, as being in a prince who was all powerful over his subjects. The relation as between man and man and his relation to the Government was forced and involuntary. The natural rights of man as being in man were disavowed.

PART II